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No. 85-1869

In the Supreme Court of the United States

OCTOBER TERM, 1986

FRANK L. HOOK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a willful attempt to evade the payment of federal income taxes through the concealment of assets violates 26 U.S.C. 7201.

2. Whether the court's failure to charge the jury on the statute of limitations constituted plain error.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A18) is reported at 781 F.2d 1166.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 1986. A petition for rehearing was denied on March 17, 1986 (Pet. App. A19-A24). The petition for a writ of certiorari was filed on May 14, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Ohio, petitioner was convicted on two counts of willfully attempting to evade the payment of income taxes for the 1976 and 1979 tax years, in violation of 26 U.S.C. 7201, and four counts of the lesser included misdemeanor of willfully failing to pay income taxes for the 1975, 1977, 1978, and 1980 tax years, in violation of 26 U.S.C. 7203 (Pet. App. A1).[1] Petitioner was sentenced to concurrent terms of three years' imprisonment on the felony counts and five years' probation on the misdemeanor counts. The terms of probation were made to run concurrently with each other and consecutively to the sentences of imprisonment. The court of appeals affirmed (Pet. App. A1-A18).

1. The evidence at trial, which is summarized in the court of appeals' opinion (Pet. App. A2-A3), established that petitioner filed timely and accurate income tax returns for the 1975 through 1980 tax years. The returns showed that petitioner owed almost $300,000 in taxes, but he paid only a few thousand dollars in satisfaction of this liability (*id.* at A3). In an attempt to evade the payment of his remaining tax liability, petitioner engaged in the following conduct to conceal his assets from the IRS:

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[1] Petitioner was acquitted on one count of conspiring to evade and defeat the payment of income taxes, in violation of 18 U.S.C. 371. Nancy Hook, petitioner's former wife, and Terry White, the proprietor of a grocery store where petitioner negotiated more than $1.2 million in checks, were charged as co-defendants in the conspiracy count, and Nancy Hook was charged as a co-defendant in each of the other counts. Their cases were severed from petitioner's and the charges against them were eventually dismissed.

he established a shell corporation to hold his assets; he used credit cards in the names of others; he purchased assets through nominees; he received checks and loans and repaid loans in fictitious names; he used large amounts of cash to make expenditures; and he used third parties to negotiate checks, sometimes made out to fictitious payees (*id.* at A2; Gov. Ct. App. Br. 2-12).

2. In affirming petitioner's convictions, the court of appeals unanimously rejected petitioner's argument that concealing assets in an attempt to evade the payment of tax does not violate 26 U.S.C. 7201 (Pet. App. A3-A7). The court found that his argument was contrary to the plain language of Section 7201, which establishes a violation if anyone "willfully attempts *in any manner*" to evade a tax or its payment (Pet. App. A4 (emphasis supplied by the court)); that his concealment of assets clearly satisfied Section 7201's requirement of an affirmative act of evasion; and that 26 U.S.C. 7206(4), under which petitioner contended he should have been indicted, is directed at different conduct and was not intended to limit the scope of Section 7201. The court, with one judge dissenting on this issue, also rejected petitioner's argument that his convictions on two of the six counts (relating to the 1975 and 1976 tax years) were barred by the statute of limitations (Pet. App. A7-A12). The court rejected petitioner's contention that the trial court's instructions required the jury to find petitioner guilty based on acts that occurred outside the limitations period (*id.* at A7-A9). The court also rejected petitioner's alternative argument that the trial court erred in not instructing the jury as to the applicable limitations period; it found that petitioner failed to object to the trial court's charge, and that the omission of a charge on the statute of limitations

issue was not plain error, "[g]iven the total lack of agreement and uncertainty that apparently existed at trial over the very operation of the statute of limitations in this case," as well as the speculative nature of petitioner's claim that the jury may have relied on acts outside the limitations period in convicting him (*id.* at A9-A12).[2]

ARGUMENT

1. Petitioner claims (Pet. 6-14) that his convictions for violating Section 7201 must be set aside because that section does not extend to attempts to evade a tax or its payment where timely and accurate returns are filed, and where the only act of evasion is the concealment of assets. The court of appeals' decision rejecting that claim is correct, and petitioner concedes that it is not in conflict with the decision of any other circuit.[3] Accordingly, further review by this Court is not warranted.

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[2] The court of appeals summarily rejected petitioner's challenges to the sufficiency of the evidence and to the admissibility of certain evidence; petitioner has not raised those issues in his petition.

Judge Merritt dissented on the statute of limitations issue (Pet. App. A14-A18). In his view, petitioner's failure to request any jury instruction on the applicable limitations period was excused by the district court's initial acceptance of the government's theory that petitioner's concealment of assets constituted a continuing offense in violation of Sections 7201 and 7203. Judge Merritt rejected the government's continuing offense theory on the ground that the language of those statutes did not compel the conclusion that Congress intended that those crimes be treated as continuing ones. Accordingly, he would have dismissed two of the six counts as time-barred and would have remanded the case for a new trial.

[3] The petition (at 6) states that the issue "had never before been addressed by any court" (see also Pet. App. A5 n.1);

a. As the court of appeals found, petitioner's argument is contrary to the language, intent, and construction of Section 7201 (Pet. App. A3-A7). Section 7201 establishes a violation if anyone "willfully attempts *in any manner*" to evade a tax or its payment. Petitioner's construction, on the other hand, would preclude prosecution if the taxpayers filed accurate tax returns and then concealed their assets before assessment to avoid paying the taxes due. Petitioner's construction of Section 7201 is also contrary to this Court's decision in *Spies* v. *United States*, 317 U.S. 492 (1943). There the Court interpreted the "in any manner" language to include a variety of affirmative acts, including, but not limited to, "concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal" (*id.* at 499). Petitioner does not dispute that such acts occurred here. He contends, however, that his conduct was not proscribed by Section 7201 because he filed timely and accurate tax returns (Pet. 6). Thus, he argues that the *Spies* case is inapposite because his affirmative acts of concealment did not "aggravate[] the interference with the assessment of tax which a failure to file creates" (317 U.S. at 10-11 (footnote omitted)). But the *Spies* decision did

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there are, however, several decisions upholding convictions under Section 7201 where part of the charge was that defendant had concealed assets (see *United States* v. *Chagra*, 754 F.2d 1181, 1182 (5th Cir. 1985), cert. denied, No. 85-5392 (Oct. 21, 1985); *United States* v. *Voorhies*, 658 F.2d 710, 713 (9th Cir. 1981); see also *United States* v. *Shorter*, 608 F. Supp. 871, 877-878 (D.D.C. 1985); *United States* v. *Jannuzzio*, 184 F. Supp. 460, 469 (D. Del. 1960); *United States* v. *Carpenter*, 175 F. Supp. 362, 364 (N.D. Ga. 1959)).

not countenance any such restrictive reading of the statute. As the Court said in *Spies*, "Congress did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished and perhaps did not lest its effort to do so result in some unexpected limitation. Nor would we by definition constrict the scope of the Congressional provision that it may be accomplished 'in any manner'" (317 U.S. at 499).

Evading the *payment* of taxes is the evil at which the statute is directed, not just avoiding the *assessment* of taxes. See *Sansone* v. *United States*, 380 U.S. 343, 354 (1965). Obviously, the public treasury is hurt as much by nonpayment resulting from evading payment as from evading assessment. Thus, the court of appeals was correct in concluding that Section 7201 reaches conduct such as the secreting of assets that was at issue in this case.

b. The court of appeals (Pet. App. A5-A6) also correctly rejected petitioner's related argument (Pet. 11-14) that his conduct could be prosecuted only under Section 7206(4). That section provides:

> Any person who * * * [r]emoves, deposits, or conceals * * * any goods or commodities for or in respect whereof any tax is or shall be imposed, or any property on which levy is authorized by section 6331, with intent to evade or defeat the assessment or collection of any tax * * * shall be guilty of a felony * * *.

Petitioner argues (Pet. 12) that Section 7206(4), which was amended in 1954 to make it an offense to conceal property on which levy is authorized, as well as to conceal goods or commodities on which a tax can be imposed, proscribes the type of conduct for which he was prosecuted. Therefore, he argues, an interpretation of Section 7201 to cover conceal-

ment would implicitly attribute irrational conduct to Congress in amending Section 7206(4) to criminalize concealment activity that was already covered by Section 7201. As the court of appeals concluded, however, "nothing in the legislative history indicates that Congress in amending Section 7206(4) intended to limit the scope of Section 7201 or believed that the amendment was necessary to fill a gap left open by Section 7201" (Pet. App. A5 (citations omitted)). Rather, "the clear import of the amendment was to preserve the property of delinquent taxpayers so that the government can collect taxes due" (*id.* at A6). Thus, in amending Section 7206(4) Congress was not filling an existing gap in the law or impliedly repealing Section 7201, but was merely strengthening the statutory provisions specifically governing the collection of taxes. Congress may well have wanted to make certain that particular violations were felonious; in doing so, it is not unreasonable to suppose that Congress intended to give the prosecution the choice of proceeding under one of two statutes. See *United States* v. *Batchelder*, 442 U.S. 114 (1979). Finally, Section 7206(4) has been interpreted to apply only when a levy has been made (*United States* v. *Swarthout*, 420 F.2d 831 (6th Cir. 1970)); thus, petitioner's interpretation of Section 7201 would create a hole in the statutory scheme, since it would preclude felony prosecution under *any* statute of a taxpayer foresighted enough to conceal his assets prior to assessment.

2. Petitioner also argues (Pet. 15-22) that his Section 7201 felony conviction for the 1975 tax year, and his Section 7203 misdemeanor conviction for the 1976 tax year are each barred by the six-year statute of limitations applicable to tax prosecutions (26 U.S.C.

6531).[4] The court of appeals correctly rejected this claim on the ground that petitioner did not raise the statute of limitations defense at trial and that the omission of a statute of limitations instruction in the court's charge did not constitute plain error.[5]

a. In excuse of his dereliction at trial, petitioner suggests that the statute of limitations is not an affirmative defense but rather a jurisdictional bar to criminal prosecution that may be asserted at any time. The overwhelming weight of authority indicates otherwise. As this Court has stated, "The statute of limitations is a defense and must be asserted on the trial by the defendant in criminal cases" (*Biddinger* v. *Commissioner of Police*, 245 U.S. 128, 135 (1917), citing *United States* v. *Cook*, 84 U.S. (17 Wall.) 168 (1872)). All the circuits that have recently addressed the question have likewise adopted the view that criminal statutes of limitations do not create jurisdictional bars to prosecution.[6] The law

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[4] The indictment in this case was returned on November 16, 1983. Consequently, the crimes charged in the indictment must have occurred after November 16, 1977.

[5] We note at the outset that, because the two felony convictions resulted in concurrent sentences, as did the misdemeanor convictions, a reversal of the 1975 and 1976 convictions would not change petitioner's sentence.

[6] See, *e.g.*, *United States* v. *Karlin*, 785 F.2d 90, 92-93 (3d Cir. 1986); *United States* v. *Meeker*, 701 F.2d 685, 687-688 (7th Cir.), cert. denied, 464 U.S. 826 (1983); *United States* v. *Walsh*, 700 F.2d 846, 855-856 (2d Cir.), cert. denied, 464 U.S. 825 (1983); *United States* v. *Williams*, 684 F.2d 296, 299 (4th Cir. 1982), cert. denied, 459 U.S. 1110 (1983); *United States* v. *Akmakjian*, 647 F.2d 12, 14 (9th Cir.), cert. denied, 454 U.S. 964 (1981); *United States* v. *Wild*, 551 F.2d 418, 421-425 (D.C. Cir.), cert. denied, 431 U.S. 916 (1977). Accord 8 J. Moore, *Moore's Federal Practice* ¶ 12.03[2], at

is also clear that a statute of limitations defense may be waived either explicitly (see, *e.g.*, *United States* v. *Meeker*, 701 F.2d 685, 686-687 n.2 (7th Cir.), cert. denied, 464 U.S. 826 (1983)) or, as it was here, by a defendant's failure to object at trial to the absence of a statute of limitations instruction (see, *e.g.*, *United States* v. *Karlin*, 785 F.2d 90, 93 (3d Cir. 1986); *United States* v. *Walsh*, 700 F.2d 846, 855 (2d Cir.), cert. denied, 464 U.S. 825 (1983)). In light of these precedents, review by this Court of the question whether a statute of limitations defense can be waived, and under what circumstances, is not warranted.

b. Nor did the trial court's omission of a statute of limitations instruction amount to plain error (see Fed. R. Crim. P. 52(b)). The power granted to courts of appeals by the plain error rule is to be used only in exceptional circumstances where the error is " 'particularly egregious' " (*United States* v. *Young*, No. 83-469 (Feb. 20, 1985), slip op. 14, quoting *United States* v. *Frady*, 456 U.S. 152, 163 (1982)). To be

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12-28 (2d ed. 1986); 1 C. Wright, *Federal Practice and Procedure* § 193, at 705 (2d ed. 1982).

Petitioner contends (Pet. 19 n.4) that there exists a conflict in the circuits on this issue, citing *Waters* v. *United States*, 328 F.2d 739, 742-743 (10th Cir. 1964), and *Benes* v. *United States*, 276 F.2d 99, 107-109 (6th Cir. 1960). The language relied on in *Benes* was, however, dictum (see *United States* v. *Meeker*, 701 F.2d at 688; *United States* v. *Wild*, 551 F.2d at 422 n.8) and, of course, an intracircuit conflict does not merit this Court's review in any event (see Pet. App. A12 n.10; *Wisniewski* v. *United States*, 353 U.S. 901 (1957)). As for *Waters*, we are aware of no case in which the Tenth Circuit has followed it since it was decided in 1964. Moreover, we note that in *Waters*, the government failed to dispute the issue (328 F.2d at 742-743).

plain error, the error must be "obvious or * * * otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings" (*United States* v. *Atkinson*, 297 U.S. 157, 160 (1936) (citations omitted)). As the court of appeals determined (Pet. App. A11-A12), this case presented no such egregious circumstances.

The district court found "that at no time prior to trial, during trial or in conjunction with his motion for judgment of acquittal at the close of the government's case in chief and at the close of all the evidence did [petitioner] raise the defense of statute of limitations as a ground for acquittal" (7/5/84 Memorandum and Order 19 n.1) (Gov. Ct. App. Br. 32).[7] Significantly, in his motions for a judgment of acquittal at trial, petitioner did raise the statute of limitations as a bar to conviction on the conspiracy count, but he never suggested that it barred his conviction on the substantive counts (see 25 Tr. 7-10; 26 Tr. 13) (Gov. Ct. App. Br. 32); the issue was first raised by petitioner in his post-trial motion for judgment of acquittal.[8] In light of "the total lack of

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[7] Citations to the proceedings in the district court are taken from the government's appellate brief.

[8] Petitioner seems to imply that his failure to object was insignificant in light of "a legal ruling which eliminated the [statute of limitations] defense" (Pet. 21). This contention is meritless. When the trial court denied co-defendant Nancy Hook's statute of limitations argument, it did so "without prejudice to defendant renewing her motion at the close of the government's evidence if she believes the government has failed to present sufficient evidence from which the jury could find that within the six-year limitations period [she] engaged in affirmative acts in furtherance of the alleged conspiracy or attempt to evade or defeat the payment of taxes" (2/27/84

agreement and the uncertainty that apparently existed at trial over the very operation of the statute of limitations in this case" (Pet. App. A11-A12), it cannot seriously be argued that the district court should have recognized any error sua sponte.

The trial court's alleged error was an act of omission, not commission and, as the court of appeals concluded, "merely created a situation in which the jury could have convicted [petitioner] while finding that the crimes occurred before November 16, 1977, a possibility we find too speculative to require reversal based on plain error" (Pet. App. A12 (citations omitted)). Moreover, even on petitioner's ultimate view of when the statute began to run (see Pet. App. A11), both the district court and the court of appeals found that there was evidence of "numerous acts by [petitioner] occurring within the limitations period which could have been employed by the jury to conclude that the Section 7201 and Section 7203 crimes for which [he] was convicted were not complete until after November 16, 1977" (Pet. App. A9; 7/5/84 Memorandum and Order 14, 16 (Gov. Ct. App. Br. 29 n.10)). Because there was an ample

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Memorandum and Order 3) (Gov. Ct. App. Br. 32 n.13). Thus, although the district court held, in denying Nancy Hook's pretrial motion for dismissal, that the statute of limitations began when the last affirmative act was completed, the holding did not relieve petitioner of the obligation to renew the motion at trial if he sought to preserve the issue. As the court of appeals noted, "[o]bjections to jury instructions are necessary to afford the trial judge the opportunity to correct mistakes in his charge" (Pet. App. A10 n.8), and a contrary rule would increase "the possibility that a criminal defendant will rely on ambiguous or incomplete jury instructions regarding the statute of limitations and appeal only if the jury verdict is adverse" (*id.* at A13 n.10).

factual basis on which the jury could have rejected the statute of limitations defense if that defense had been raised at trial, this case does not present the kind of miscarriage of justice that is required to invoke the plain error rule.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9] Not only was any error not "plain," there was no "error" at all, since the offense was a continuing one and therefore there is no question that the statute had not run. Under the circumstances, however, we agree with the court of appeals (Pet. App. A11-A12 n.9) that this issue need not be reached.

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